UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 95-7969
Filed June 25, 1996

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ___ day of _____, one thousand nine hundred and ninety-six.

PRESENT:

Hon. James L. Oakes,
Hon. Frank X. Altimari,
Hon. John M. Walker, Jr.,
Circuit Judges.

JIMMIE GARNER and CONNIE GARNER,

Plaintiffs-Appellees,

—v.—

ENERGY TRANSPORTATION CORPORATION,

Defendant-Appellant.

APPEARING FOR APPELLANT: JOSEPH T. STEARNS
NEW YORK, NEW YORK

APPEARING FOR APPELLEES: PAUL T. HOFMANN
NEW YORK, NEW YORK

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Knapp, *Judge*), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Defendant-appellant Energy Transportation Corporation appeals from a judgment of the district court denying the defendant's motion for a new trial pursuant to Fed. R. Civ. P. 59. This is a seaman's personal injury action brought pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law alleging liability for negligence and unseaworthiness. Following a nine-day jury trial, the ten-member jury awarded the plaintiff damages in the amount of $1.1 million in connection with two slip-and-fall incidents which occurred while he was employed aboard the defendant's ship. The $1.1 million

award comprised $672,000 for pain and suffering, $128,000 for past pecuniary loss, and $60,000 per year for five years for future pecuniary loss.

The defendant primarily argues that a new trial is required on the ground that the district judge "testified" in connection with the defendant's cross-examination of the plaintiff and during the court's charge addressing witness credibility. Although this trial may not have been error free, the defendant is entitled only to a fair trial, not a perfect trial. It is well established that a judge may ask questions of a witness that may aid the understanding of the jury. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied*, 498 U.S. 290 (1990). Moreover, the district court did not "step across the line and become an advocate for one side." *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996). We find that the judge's comments, while less than desirable, did not compromise the fairness of the trial to the defendant.

The defendant also argues that the jury's verdict cannot be sustained because it failed to apportion damages between the plaintiff's two on-board injuries. The defendant, however, failed to object to the portion of the charge instructing the jury that it need not do so if it found no contributory negligence on the part of the plaintiff. The jury found no contributory negligence by the plaintiff. Moreover, although it is possible that the jury impermissibly awarded additional damages for lost wages solely on account of the plaintiff's elbow injury, we decline to disturb the award since there is a rational basis for concluding that the jury made a proper award based on the jury's answers to the remaining interrogatories.

Finally, the defendant contends that the jury verdict should be reduced on the ground that it was excessive. Because we find that it is not so excessive that it shocks the conscience of the court, we uphold the verdict. *See Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993). We have considered the defendant's remaining contentions and find them to be without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

HON. JAMES L. OAKES
Hon. James L. Oakes, U.S.C.J.

HON. FRANK X. ALTIMARI
Hon. Frank X. Altimari, U.S.C.J.

HON. JOHN M. WALKER, JR.
Hon. John M. Walker, Jr., U.S.C.J.

ENDORSEMENT

Jimmie and Connie Garner v. Energy Transportation Corporation 92 Civ. 8660(WK)

WHITMAN KNAPP, SENIOR D.J.

For the reasons stated on the record on September 8, 1995, defendant's annexed motion for a new trial is denied.

SO ORDERED.

DATED: September 8, 1995
New York, New York

/s/ WHITMAN KNAPP
WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 8660

September 8, 1995 11 a.m.

JIMMIE GARNER and CONNIE GARNER,

Plaintiffs,

—v.—

ENERGY TRANSPORTATION CORPORATION,

Defendant.

Before:

HON. WHITMAN KNAPP,

District Judge.

APPEARANCES

CAPPRELLO, HOFMANN & KATZ
Attorney for Plaintiffs

BY: PAUL T. HOFMANN

KENNY & STEARNS
Attorney for Defendant

BY: JOSEPH T. STEARNS

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[2] (Case called)

MR. STEARNS: Good morning, your Honor. As you know, my name is Joseph Stearns representing Energy Transportation Corporation, the movant seeking a new trial pursuant to Rule 59 of FRCP. Multiple grounds are alleged, as the court is aware, including the fact that the verdict in plaintiffs' favor was against the great weight of credible evidence.

THE COURT: Don't argue that point.

MR. STEARNS: And, in addition, the court, among other things, telling the jury that lying was not his experience—

THE COURT: I put that in every charge I have given since I have been on the bench and so far I haven't been reversed on that ground and I don't think it will be this time.

MR. STEARNS: I had that thought very recently because it explains certain things about the way the case was presented. In any event, a deliberate intention to deceive by a witness is a credibility issue. If the court tells the jury that in its experience that is not usually done, the court has testified.

THE COURT: And you didn't object at the trial of course.

MR. STEARNS: Sir, I did object at the trial.

[3] THE COURT: What did you say?

MR. STEARNS: I said I was very concerned and I thought it was wrong that you had made this remark regarding credibility.

THE COURT: Where is that?

MR. STEARNS: It's—

THE COURT: Show it to me.

MR. STEARNS: I do not have the transcript. I will find it for you and send up copies with a letter.

THE COURT: I don't think you need to show it to me because I think I am right on your objection but you made your point.

MR. STEARNS: If I might because of the importance to my client and the people they employed—

THE COURT: I happen to think my charge was correct and I also recollect you didn't object to it but if I am wrong on that—

MR. STEARNS: You are quite right in your recollection that at the time it was given I did not. However, after the jury retired—

THE COURT: After the jury.

MR. STEARNS: —and before their verdict that objection was made.

THE COURT: I see.

MR. STEARNS: In any event, there is one other [4] thing that I should mention. As Mr. Hofmann pointed out in his papers, page 18 in which he quotes the charge or the preface to the charge in which you advise the jury of your experience regarding witness' deliberate intention to deceive, it's pointed out—that is, the text points out—that immediately after making that remark the court gave the falsus in uno charge telling the jury not that they were free to disregard all the witness' testimony but they should take very seriously—

THE COURT: I think I told them they could disregard all of it.

MR. STEARNS: That is the point I want to make. The juxtaposition of the preface of the charge regarding the court's belief as to what witnesses usually do in its experience and falsus in uno. Now, falsus in uno, of course, refers to false testimony which is testimony that is offered which deliberately intends to deceive and if you tell the jury that witnesses

don't usually do that, then, of course, the falsus in uno charge is an irrelevancy. It's completely undercut.

What I am trying to do is complete my argument made in the papers about the importance, the fundamental nature of the error in telling the jury the court's personal opinion about what witnesses in its experience usually do. Because it is law, and probably it has been charged in every **[5]** civil case in this court for likely 200 years, that the jury should be instructed that they are free to disregard testimony in its entirety if they believe in one aspect it is false.

Now, as the court is aware, the defense of the defendant in this case was that Mr. Garner and his wife had testified with deliberate intention to deceive. If you tell the jury based on the court's experience that this does not usually happen and then you mention falsus in uno, there is a contradiction because you are telling them that the predicate, i.e., false testimony in a single respect of falsus in uno permitting the jury to reject all testimony of a witness—

THE COURT: When did you first object to this?

MR. STEARNS: I am telling you that. I will go further. It's not even in my papers.

THE COURT: What?

MR. STEARNS: I am saying that what I am saying now is not even in my papers. That is how embarrassed I am and I am completing my record by telling you this because it frames, as well perhaps as anything, the issue. What I am saying is if you tell the jury that witnesses do not usually lie and then give them a falsus in uno charge the falsus in uno charge is meaningless because you have told them that the predicate of that charge that a witness deliberately **[6]** testified with intention to deceive doesn't happen.

THE COURT: You never mentioned that during the trial.

MR. STEARNS: I did not, sir.

THE COURT: Okay.

MR. STEARNS: I did not. Connections between one thing and another thing sometimes escape ordinary lawyers like myself. However, it's important I bring it to your attention.

In addition, as has been pointed out in the papers, Jimmie Garner in the course of cross examination admitted that he perjured himself in that affidavit. He said that the affidavit was not only inaccurate, he also said it was untruthful.

THE COURT: That is not necessarily perjury unless he knew it was untruthful at the time he said it.

MR. STEARNS: This was simply inappropriate because there is no question that the nature of claim for damages in this case changed between the filing of the complaint on October 16, 1992 and the trial of the case early this year. The affidavit and the complaint make plain that when the suit was instituted Mr. Garner was claiming that his "employer" was negligent in allowing him to remain aboard ship after January 13, 1990. The accident report includes the description of his knee injury which occurred [7] either the 17th or 18th of January, 4 days later, was in part caused by the condition of his knee in addition to the fact that there was wind on deck.

Now, that makes perfectly plain the fact that, as is alleged in the complaint, the original case was one for aggravation of a preexisting condition, which is what the complaint after all says, and the theory of the case was based on liability for failure to treat in allowing Mr. Garner to remain aboard ship with his knee in the condition it was as a result of his fall at home. Now, that is necessarily so because of the statement in his affidavit. "I should not have been allowed to remain aboard ship after January 13" speaks of a date which is 4 days after (sic) the ship reported the accident. Unfortunately, as I pointed out, there is motive and was in this case for changing the basis for the claim of damages.

Plaintiff has three-compartment osteoarthritis in his knee in September 1989. After the complaint, and of course before trial, his treating doctor, Danny Sparks in Gadsden, Alabama, the surgeon who operated on his knee and put in a prosthesis,

testified it would be very difficult and complicated for him to make any assessment or apportionment of cause of the need for surgery to an accident aboard a ship if, as the doctor said, the condition of his knee is the result of a fall at home occurring just [8] before he shipped out had been the source of ongoing symptoms.

The case would have been as originally pleaded and identified in Mr. Garner's October 14, 1992 affidavit, which he gave to his attorney in Alabama, for reaggravation of a condition long-standing as of 1989 as a result both of an accident falling off the porch at home on December 28, 1990 and in addition to that some contribution from a shipboard fall.

In addition, the claim of failure to treat, given the testimony at trial considered in its entirety, would not have been very likely well received by the jury because the claim was, and it's expressed in the affidavit, they should have sent me home after arrival at the first port in Indonesia on January 13, 1991; that Captain Smith was negligent in allowing him to be signed on the ship.

Now, given the captain's testimony, to some extent corroborated by Mr. Garner, that it was Garner's wish not to be sent home or to a doctor for examination when he arrived aboard the ship in Japan, the jury would have been presented with a case where based on the claim the substance would have been the captain should have saved Garner from his own folly and should have anticipated if he was out on deck in windy conditions because of the deteriorated and injured condition of his knee he might be caused to fall and [9] sustain further injury.

There is no question that that is the complaint allegation and that the affidavit adopts that view of liability for (sic) no other way. So we have a situation where there would have been an indeed frail claim of liability if it were acknowledged, as Mr. Garner did after all acknowledged to his physiotherapist, Mr. Bishop, that the injury at home in December 1990 had been the source of ongoing problems.

What happened was the two distinguished gentlemen who testified in this case for defendant, the captain and the chief mate, permitted a man to be signed on the ship who should not have been and he was permitted to do that because the master knew that to send him to a doctor and if that doctor found that Mr. Garner was unfit for duty he would have lost his job. Shipping conditions for people in the American Merchant Marine are not good. To be a bosun, part of the steady rotation aboard these ships basically entitled to six or more months of employment at very high wages compared to world scale is a very, very vitally important career position to a man like Mr. Garner who has a younger wife and quite young children.

That was presented to Captain Smith and, as he testified, Mr. Garner pleaded with him not to be sent to a doctor, although Mr. Garner's arrival in Japan after an **[10]** accident at home occurring between the time he had his presign-on physical examination by his union and showing up at shipboard having on his own without regard to what he was required to do taken it upon himself to present himself in this distress situation to the captain hoping, and he was successful, that the captain would extend to him the compassion that he admitted the captain had showed him in conversations with Dr. Sparks, as Dr. Spark's records reflect, was something that would have gotten him fired, would have put him to the expense of paying his own way home, and likely the expense of flying a substitute bosun out to the ship in Japan to relieve him.

The captain signed him on. The man was examined as he admitted. Ultimately on January 6, 1991 he was found to have a very badly sprained and swollen knee.

THE COURT: You are telling me a lot of things you have heard about but what are you arguing here?

MR. STEARNS: I am arguing the circumstances of the case and how—

THE COURT: Are you arguing sufficiency of evidence?

MR. STEARNS: No.

THE COURT: What are you arguing?

MR. STEARNS: What I am arguing is the vital fundamental importance of the issue of deliberate intention [11] to deceive.

THE COURT: All right. I will hear no further on that. Go on to your next point.

MR. STEARNS: Should I revisit the introduction to the charge?

THE COURT: Don't revisit anything.

MR. STEARNS: I have cited the Supreme Court case, which is on all fours and the Second Circuit case involving American Export Lines.

The other issues involve interruption of cross examination both on Mr. Garner's deposition testimony and on his affidavit and the court's ruling that Mr. Garner did not understand what the word truthful meant.

THE COURT: You argued that before.

MR. STEARNS: Okay.

The other issues have to do first with the excessiveness of the verdict.

THE COURT: Don't argue that.

* * *

[14] THE COURT: Well, I have listened to you very carefully but nothing you say has persuaded me, and I don't suppose you want to change my view.

MR. HOFMANN: No, Judge.

THE COURT: Motion denied.

Thank you.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 8660(WK)

April 18, 1995

JIMMIE GARNER and CONNIE GARNER,

Plaintiff,

—against—

ENERGY TRANSPORTATION CORPORATION,

Defendant.

ORDER OF JUDGMENT

THIS MATTER HAVING BEEN heard before the Honorable Whitman Knapp, and having been tried to a jury by plaintiff, through his counsel, Cappiello Hofmann & Katz and defendant, by its counsel, Kenny & Stearns, and said jury having commenced on March 13, 1995, and a verdict having thereafter been rendered in favor of plaintiff on March 24th, 1995 in the following amounts:

For past pecuniary losses: $128,000

For future pecuniary losses: 5 years at $60,000/year

For past and future pain and suffering: $672,000

AND THE PARTIES HAVING AGREED to permit the Court to determine the present value of the future damages and the prejudgment interest awardable;

AND THE COURT, having performed the calculation on the present value of the future damages, finds—without objection of either party—such value to be $282,810.

AND THE COURT further finds—over defendant's objection—that plaintiff is entitled to $7584.40 in prejudgment interest.

AND FURTHER, the plaintiffs having voluntarily discontinued the action on behalf of CONNIE GARNER, her claims, as stated in COUNT IV of the complaint, are hereby dismissed.

THEREFORE, IT IS ON THIS 13TH DAY OF APRIL, 1995 ORDERED, ADJUDGED AND DECREED, that judgment, retroactive to March 24, 1995, is to be entered in favor of plaintiff, JIMMIE GARNER, against defendant, ENERGY TRANSPORTATION CORPORATION, in the amount of $1,090,394.40, plus costs of the litigation to be assessed by the clerk of the court.

SO ORDERED.

New York, New York
April 13, 1994

/s/ WHITMAN KNAPP
WHITMAN KNAPP, SENIOR U.S.D.J.

9/22/95 Bill of costs as taxes in the sum of $3697.65 Plaintiff as against Defendant

#95, 0790

/s/ JAMES M. PARKISON
CLERK

By: RONALD A. CHURCH
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 95-7969
Filed August 27, 1996

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27 day of August, one thousand nine hundred and ninety-six.

GARNER

Plaintiffs-Appellees

—v.—

ENERGY TRANSPORTATION

Defendant-Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant July 9, 1996.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

AFFIDAVIT

My name is Jimmie Garner of 3965 Hood Drive, Gadsden, Alabama 35903 (442-8329) I have personal knowledge of the following facts:

I have been in the Merchant Marines since 1963. Since 1984, I have worked for Energy Transportation Corp. At the present time, I am Boatswain, or a supervisor, of maintenance and repairs on the LGN Aquarius. I have 9 men under me.

On 1/18/91, I was working on the bow of the ship and a strong wind was blowing dead ahead (35-40 knots).

* * *

The wind was blowing very strong. I fell on the slippery deck. When I fell, I hurt my left knee and thought I broke it.

* * *

I previously injured my left knee when I was home on leave. The accident occurred when my wife and I were taking a box out of the house. I stepped off a step and twisted my knee. I was not treated by a doctor.

I reported to work on 1/4/91 in Japan. On 1/6/91, I mentioned to the chief mate that I had injured my knee at home and my knee was swollen. He gave me Ibuprofen 800 mg., one tablet three times a day. He placed on his report 'light duty, stay off knee as much as possible.' I was not informed that I was on light duty. I was given an ace bandage.

On 1/13/91, we were at port in Indonesia. I did not know I was on light duty and I was not instructed to obtain medical treatment. If I was classified as stated, I should have received medical treatment.

* * *

I believe my employer was negligent in allowing the slick deck to exist, in allowing me to stay on the ship after 1/13/91, and in assigning me duties on 3/13/91.

I have lost wages and do not believe I will be able to work to age 65 as I had planned.

/s/ JIMMIE W. GARNER
JIMMIE GARNER

OCTOBER 14, 1992
DATE

Sworn to and subscribed to
before me this 14th day
of Oct, 1992.

/s/ MYRON ALLENSTEIN
NOTARY PUBLIC

Direct Examination of Plaintiff Jimmie Garner

[199] Q. At—during this period from March until July, did you have a discussion with Dr. Sparks concerning further care he wanted to do on your elbow?

A. Yes.

Q. What was conveyed to you?

A. Along the very latter part of my physical therapy [200] that bone in there had slipped in therapy, and along summer, the latter part of it, he recommended that I needed to have a pin put in there and I told him, I says, look, I'm getting ready to go back to sea, I've got to go back to work.

Q. Did he give you any other options with respect to this problem that you just described?

A. He said it was nothing serious at the time, that later on in life I may end up having to have some attention brought to that but right now it was not necessary, that he would just make mention that I needed a pin.

Q. What did you choose to do?

A. I choose to go ahead and go back to sea.

* * *

Cross Examination of Plaintiff Jimmie Garner

[384] Q. Now, did you say the second paragraph of your affidavit of October 14th, 1992, that you mentioned to the chief made—and I will read it word for word—on 1/6/91, I mentioned to the chief mate that I had injured my knee at home, and my knee was swollen."

Q. Now, was that statement which you made in October 1992 under oath accurate?

A. No, sir.

Q. Was it truthful?

A. No, sir.

[385] THE COURT: What do you mean by, "No, sir"?

THE WITNESS: There is an explanation of that.

THE COURT: "Truthful" means that you knew it was not true when you wrote. It that what you intended to say?

THE WITNESS: No, sir.

THE COURT: It was mistaken?

THE WITNESS: It was mistaken.

THE COURT: So you did not realize what truthful meant when you answered that question?

THE WITNESS: I am confused about that.

THE COURT: That's the end. No more discussion.

THE WITNESS: Okay.

* * *

[387] THE COURT: Received.

(Defendant's Exhibit YY for identification [Plaintiff's October 14, 1992 affidavit] received in evidence)

MR. STEARNS: Your Honor, with your permission, may I read that paragraph?

THE COURT: Certainly.

Incidentally, understand that when I interrupt to question the witness, there is no importance to that, and I have no views one way or the other. It was a word he didn't understand.

[388] Q. When I have just red these excerpts from the affidavit are in certain material respects, you now claim, inaccurate, is that right?

A. That is correct.

Q. You said you were given access to your entire file concerning the events in January and March, 1991, by Lionel Senas, the master of the Leo, when you returned to the ship about a year later, right?

A. The first time I—

[389] Q. The return to the ship was not a year later, but you said that you were given your complete file by Captain Senas about a year after you left the ship on March 13, 1991, is that right?

A. When I was leaving, he gave it to me.

* * *

[394] MR. STEARNS: May I have a sidebar conference?

THE COURT: Yes, you may.

(In the robing room)

THE COURT: The purpose of cross-examination is to get facts, not to sum up.

MR. STEARNS: I am not summing up.

THE COURT: Yes, you are.

MR. STEARNS: I am entitled, am I not—

THE COURT: You are not entitled to sum up or argue with the witness. You are entitled to get facts.

MR. STEARNS: I am not arguing with the witness.

THE COURT: You are. You keep on saying, "Wasn't it so, wasn't it so, and still you did it." That is summation.

MR. STEARNS: Am I entitled, through the witness's testimony—

[395] THE COURT: What?

MR. STEARNS: Am I entitled, through the witness's testimony, to point up inconsistencies?

THE COURT: No. You are entitled to point up inconsistencies by getting them on the record, and then you argue to the jury. You do not argue with the witness. We do not have a concurrent summation. Among other things, it is crucifying your case. You are always saying alleged, claimed, action, always telling the jury you think he committed perjury. The jury doesn't think he committed perjury.

MR. STEARNS: How do you know that?

THE COURT: Because I can observe them and observe their reactions. I don't think anybody thinks he has committed perjury. I think the facts are entirely different from what he testified to, but that is not perjury.

MR. STEARNS: That because he is exempt—

THE COURT: Because he is a human being.

MR. STEARNS: He is fallible.

THE COURT: Not only is he fallible, but every human being who ever lived keeps on reconsidering things and changing their views of what happens, and a lawyer accuses him of perjury and the jury knows damn well it is not perjury. All you are doing is evoking sympathy for him by **[396]** asking him silly questions. He said it happened on the 13th and it happened on the 14th, and you are trying to make a liar out of him because it was the 13th and not the 14th.

MR. STEARNS: I don't know quite what to say.

THE COURT: Well, anyway, that is my ruling. But the purpose of cross-examination is to ask questions, not to argue with the witness.

THE COURT [sic. Mr. Stearns]: I am pointing up inconsistencies. [The Court] You are not. You are arguing with the witness. Stop it.

You have an exception to my ruling.

I told you, you shouldn't accuse your opponent of suborning perjury, and you shouldn't continually accuse him of perjury by your questions: You allege, you claim.

MR. STEARNS: Let me just say, I am entitled to my view. This man is committing perjury.

THE COURT: I do not agree with you and I don't think the jury does, and by continually accusing him of it, you are enhancing the damages that you are going to pay.

* * *

[The Trial Judges "Comments" Addressing Witness Credibility]

[1178] That's the end of Bob Hope. We will get down to business.

In the first place, I will ask the clerk to circulate among you a copy of the verdict sheet that you are going to have to answer at the end, and I will refer to it from time to time.

You might as well read it to yourselves and I will refer to it. (Pause).

THE COURT: That gives you a general idea of what you are going to be up to. I will refer to it as we go along.

In the first place, let me remind you what I said way at the beginning with respect to the division of functions between you and me. You are supreme on the facts, and I have to deal with the law. What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think of the facts are. Don't read into the order I say things or the way I say things any impression I may have. Because, as I told you, my theory of how the jury system works is that each of us does our own job and doesn't pay any attention to how the other one is doing his or her job.

Now, the first responsibility is finding out the facts. Your responsibility is findings out the facts. The **[1179]** first thing you want to do is judge the credibility of the witnesses. I don't happen to like the use of the word "credibility," because but I can't think of any other word, so I have to use it.

The reason I don't like it is it suggests if a witness is not credible, he is lying, or she, and I have no way of knowing whether that happened in this case. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether that happened in this case or it didn't. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself what he or she is saying by the time

they get on the witness stand, and that is to about the extent of it. That may be wrong, they may misremember things. That is for you to determine. But I will come back to that again shortly.

How do you judge the credibility? You judge credibility the way you do in your daily lives. You are always called upon to judge credibility of the people you are dealing with, that is, judge the extent that you want to rely on what they say. Do they know what they are talking about? Have they any intention to deceive you or any interest in deceiving you? When I say intent, that implies lying, and that is usually not what I think happens. Do **[1180]** they have any interest in deceiving you? Do they seem to know what they are talking about, and so on?

* * *

That is what you do here in the formal atmosphere of the courtroom. You have direct and cross-examination. Does the witness seem to you to be acting more or less alike on direct and cross-examination? Or when it comes to cross-examination, does he seem, he or she seem to adopt a different attitude, suggesting that he may have consciously or subconsciously be trying to deceive you. Or on cross-examination, does he or she seem to be trying to answer questions, not trying to convey impressions? That is something for you to consider.

Obviously, to what extent does the witness have an interest in the outcome? Well, in this case just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest. They want to you have give them money, when they get it, they will spend it. I can't think of a better interest in the outcome. Presumably you may find the defendants—none of the defendants have, as far as we know, any pecuniary interest personal to them, but people have interests in defending people they work for and their reputation with the people they work for. All those things are for you to weigh.

* * *

INJURY REPORT

[ENERGY (LE-687-INJ)]

Name JIMMIE W. GARNER Rating Boatswain

Address Rt #1, Box 517 Gadsen, Alabama 35901

Date of Injury 12/27/90 Time __-__ Port At Home

Date Reported 1/6/91 Time 1500

Reported to Whom (Name/Rank) A. F. BARNES, Chief Mate

Report prepared by A. F. BARNES Rating Chief Mate

Nature of Injury Sprain, swelling of left knee.

Injury Investigated by A. F. BARNES, Chief Mate

Name of Person in Charge of Work A. F. BARNES, Chief Mate

Medical Treatment by Vessel if any Ibuprofen, pain/anti-inflammatory 800 mg tablets, one tablet 3 times a day for pain and swelling. Ace bandage wrap for knee.

Describe in detail area of injury, equipment involved and condition of both Bos'n GARNER had been working on the bow and in forward stores (BB court) the morning of 18 January 1991. At the time of his fall at about 0930 on 18 January 1991, a strong relative wind was blowing from ahead of about 35 to 40 knots. The force of this wind is increased in the vicinity of No. 1 Tank cover.

Injured's statement of how injury occurred I initially sprained my knee when I stepped off my porch at home and twisted my leg. The injury to my knee was aggravated when the wind caught me when I was proceeding aft on the main deck port side at No. 1 tank at about 0930 on 18 January 1991, and I

fell down on the deck again twisting my leg.

Dated 9 January 1991 [sic]

Injured's Signature JIMMIE W. GARNER

MEDICAL LOG

LNG LEO Voy 238 From 5 January 1991 To 22 January 1991

1	2	3	4		5		6	7	8	9	10
No.	Date	Name and Rating	Acc.	Ill.	1st Rep Visit		Give Brief Description of Injury or Illness Treated, and Apparent Cause	Treatment	Disp	Rep	Signatures
1	1/5 6	None Jimmie W. GARNER, Bos'n.	X		X		Swollen, sprain to left knee. Reported time 1500.	Ibuprofen 800 mg tablets, one tablet 3 times a day. Light duties, stay off knee as much as possible.	1	✔	/s/ JIMMIE W. GARNER

[LETTERHEAD OF GADSDEN PHYSICAL THERAPY CLINIC]

Name: Jimmy Garner
Physician: Dr. Sparks
Dx: S-post arthroscope of the left knee for cartilage tear also s-post closed fracture of the left radial head
Date: 03/29/91

Prescription: Elbow rehab for ROM and strengthening also knee rehab

Frequency: 3 x a week

History and Subjective: Pt. is a 51 YOWM who states that he twisted his leg back on December of 1990, continued to have problems with it and had surgery last Saturday for torn cartilage. He also has a fracture of his left radial head that he had for two to three weeks when he fell at work and hit on his elbow. At this point, he has elected to go without surgery but will be reexamined by the physician in one week to make a further decision on this.

* * *

Thank you for this referral,

/s/ DAVID A. BISHOP P.T.
David Bishop, P.T.

EXCERPTS FROM RECORDS OF DANNY SPARKS, MD, PLAINTIFF'S TREATING PHYSICIAN

GARNER, JIMMY ACCT: 5063 3/29/91

Returns, follow-up (L) radial head fracture and arthroscopy, (L) knee. He is doing extremely well with his (L) knee. Excellent ROM. Good strength. He is walking unassisted now. Wounds are clean, healed and dry. We have removed sutures today. He has excellent ROM, which he has obtained all on his own, as far as his (L) elbow is concerned. Neurovascular status intact.

X-RAYS: Elbow films reveal that the fractured piece has migrated distally somewhat. This was always a questionable fracture. I think it might do better with an ORIF, since this is such a large piece, and has slipped some now.

He would like to give therapy a try, since he is doing so well. I think that is certainly acceptable. We will give him a week. Return at the end of that week.

DRS/jw